

**Board of Alien Labor Certification Appeals**  
UNITED STATES DEPARTMENT OF LABOR  
WASHINGTON, D.C.

DATE: April 3, 1997

CASE NO: 95-INA-510

**In the Matter of:**

**Shiva Restaurant, Inc., dba KWALITY,  
Employer,**

**On Behalf of:**

**SUNIL BHARDWAJ,  
Alien**

Before: Holmes, Huddleston, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Sunil Bhardwaj (Alien) filed by Shiva Restaurant, Inc., dba Kwaliti (Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

**Statutory authority.** Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

---

<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.<sup>2</sup>

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

**Statement of the case.** On September 23, 1993, the Employer filed an application for labor certification to enable the Alien, who is a national of India, to fill the employment opportunity position of Manager/Market Research (Bilingual) in the Employer's restaurant in Jackson Heights, New York. The duties of the position offered were described in Form ETA 750 as follows:

Research market conditions in local area, described as "Little India," to determine potential sales of services provided by corporation whose business operations consist of ownership of an Indian Restaurant, Catering Services/Hall Rentals (Indian Style) and Ethnic Indian Sweet Shop. Establishes research and gathers data for forecast of future marketing within these current operations of corporation and report information to Stockholders of the corporation. Researches expansion of business owned by corporation and gathers data on competitors within local area and collect data from present clientele serviced by corporation in their ethnic principles to these customers in their relationship with restaurant/catering services & sweet shop.<sup>3</sup>

The minimum educational requirements are a baccalaureate degree with a major in either Economics, Accounting or Marketing. The required experience is three years of experience in the job offered or in a Related Occupation as "Manager/Marketing, any field." The other Special Requirements were originally stated as "Must be computer knowledgable/Must read, write & speak English & Hindi & Urdu."<sup>4</sup> On April 28, 1994, the special requirements were amended to strike the requirement that the employee be "computer

---

<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>Spelling and punctuation is as in the original text in AF 05.

<sup>4</sup>Spelling and punctuation is as in the original text in AF 05.

knowledgable" and the Employer substituted, "Use in application of Lotus, Dbase and Word perfect required." AF 26.

The Alien's immediate supervisor in this job will be the President of the Employer corporation, and the Alien will have no supervisory duties. The rate of pay offered for a forty hour week on this position was \$600, for a work day beginning at 12:00 Noon and ending at 8:00 PM. AF 05. The CO classified the job under Occupation Code 050.067-014, Market Research Analyst.

Alien's qualifications. The Alien's educational qualifications met the application criteria with a baccalaureate degree in "Economics/Accounting" from the University of Delhi, and a Master's degree in "Business Administration" from the University of Bradford at London. In addition the Alien received a Certificate of Completion of five months of "Computer Courses" in New Delhi. In addition, the Alien speaks, reads and writes English, Hindi, and Urdo. AF 24.

**Notice of finding.** On February 28, 1995, the CO's NOF advised the Employer that certification would be denied on the record as it stood, subject to rebuttal on or before April 4, 1995.

(1) The CO questioned whether Employer's position of market research analyst is permanent and fulltime or whether the job is a combination of two positions---Market Research Manager and Manager, Sales. The CO directed the Employer to explain its business interests and document that a fulltime position exists for a market research analyst that is available on a permanent basis.

(2) Observing that the language requirement for Hindi and Urdo appears restrictive and can have a negative effect on the U. S. applicants, the CO directed that the Employer either delete the Hindi and Urdo language requirement or submit evidence that the foreign language requirement arises from business necessity rather than the Employer's convenience, citing the regulations at 20 CFR § 656.21(b)(2)(i). AF 64-67.

**Rebuttal.** By the March 17, 1995, letter and attachments of the Employer's representative, the Employer discussed the issues raised in the NOF, filed a copy of Form ETA 750, and enclosed documentation to comply with the CO's directions. AF 68-91.

Employer argued that its peculiar needs required the hiring of a Market Research Analyst, even though it is unconventional for businesses of its size and type to do so. Because the person in this position would interact with customers and others who speak the required foreign languages in the immigrant community where it is located, the Employer argued that it had established

the business necessity of fluency in the specified languages. AF 87-91. By way of documentation, the Employer attached portions of the files in other labor certification cases, including applications, bilingual advertisements, and a supporting letter by the president of this Employer, all of which the Employer requested be considered in support of this application. AF 69-86.

**Final Determination.** By the Final Determination (FD) the CO denied certification on April 11, 1995. First, under 20 CFR § 656.21(b)(2) the CO found that the job did not constitute full time employment and was a combination of duties that the Employer did not demonstrate was based on business necessity. The Employer failed to comply with the CO's directions to document its need for a market research analyst as a fulltime permanent position requiring the services of the Alien. AF 103. While the Employer's rebuttal stated in general terms its business reasons for seeking to hire a Market Research Analyst and indicated it was aware of the nature of the work it wanted accomplished, it failed to document any supporting facts connecting those generally stated objectives to its business. It followed, said the CO, that Employer failed to document that it had a permanent fulltime position for a Market Research Analyst.

Second, the CO then considered the record under the same regulation and found that the Employer had failed to produce supporting documentation to show the business necessity of its language requirements. The CO accepted the representation that many Indians and Pakistanis live in Jackson Heights. This, said the CO, is not sufficient to establish the business necessity for the stated language requirement without more, since each case for alien certification is adjudicated on its own circumstances and merits. Thus, proof that the business is located in an ethnic neighborhood does not automatically lead to such a finding.

In conclusion, the CO denied certification because the Employer failed to sustain its burden of proving that this is a permanent and fulltime position and not a combination of two positions, and because the Employer also failed to document the business necessity for the two languages specified in this application. AF 101-104.

**Request for Review.** The Employer again submitted the written arguments it had filed in response to the NOF. AF 105-107. The cases cited have been examined, and Employer's argument has been reexamined in the context of this appeal.

### **Discussion**

As the NOF and FD pointed out, in the absence of more documentation, the job description in this application does not describe duties that are sufficient to require the time that the

work schedule allotted to the respective functions. **Delitzer Corp. of Newton**, 88-INA-482(May 9, 1990)(en banc). As Employer did not show that the job it seeks to fill is bona fide, it cannot establish that certification should be granted for this Alien. After examining the record and Employer's arguments, we agree with the finding of the CO that the Employer failed to demonstrate that it was offering a permanent fulltime position for a Market Research Analyst. For this reason it is concluded that the employer failed to carry its burden of proof under the Act and regulations and the CO's denial of certification should be affirmed. It follows that the Employer's appeal from the CO's finding that it failed to document its business necessity for an employee who is fluent in Hindi and Urdu is moot.

Accordingly, the following order will enter.

**ORDER**

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

---

FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

---

Sheila Smith, Legal Technician

